



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 02 2013** OFFICE: VERMONT SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director initially approved the nonimmigrant visa petition. Upon subsequent review of the record, the director issued a notice of intent to revoke (NOIR), and ultimately did revoke the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. Approval of the petition will remain revoked.

The petition was filed at the Vermont Service Center on June 25, 2009, seeking to classify the beneficiary as an H-1B temporary nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b) in order to employ her in what it designates as a programmer analyst position.

The visa petition indicates that the petitioner intended to employ the beneficiary from October 1, 2009 to September 30, 2012. On the visa petition, the petitioner stated that the beneficiary would work at the petitioner's location in Richmond, Virginia. The Labor Condition Application (LCA) submitted with the visa petition is certified for employment in and around Richmond, Virginia, and for no other location.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for evidence (RFE); (3) the response to the RFE; (4) the service center's NOIR; (5) the director's revocation letter; and (6) the Form I-290B and counsel's submissions on appeal.¹

USCIS may revoke the approval of an H-1B petition pursuant to 8 C.F.R. § 214.2(h)(11)(iii), which states the following:

- (A) Grounds for revocation. The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:
- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
 - (2) The statement of facts contained in the petition was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or
 - (3) The petitioner violated terms and conditions of the approved petition; or
 - (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

¹ The AAO would also have considered the response to the NOIR, but the record contains no such response, as is discussed below.

- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

- (B) Notice and decision. The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

The service center issued an RFE in this matter on August 31, 2009. The service center requested a list of the locations where the beneficiary would work and the duties she would perform during the period of requested employment.

In response, the petitioner provided information pertinent to an application it is developing in-house, [REDACTED]. All of the evidence submitted in response to the RFE indicates that the beneficiary would be employed exclusively at the petitioner's [REDACTED] location throughout the period of requested employment. The director approved the visa petition on January 15, 2010.

However, on February 23, 2012, the service center director issued an NOIR in this matter. That notice stated that the petitioner had failed to provide sufficient documentation of the location where the beneficiary would work and the project the beneficiary would work on. The NOIR concluded that the petitioner had not demonstrated that it has work for the beneficiary to perform, and that the proffered position either had never existed or no longer existed.

Upon review of the record, the AAO finds that the NOIR was sufficient to place the petitioner on notice that revocation of the approval of the petition was contemplated within the scope of the revocation-on-notice provisions, namely, that the approval of the petition violated the regulatory requirements regarding the proffered position at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2), and (3). The record contains no response to that notice.

The director revoked approval of the visa petition on May 24, 2012, finding that the petitioner had failed to demonstrate that it continued to employ the petitioner in the capacity specified in the petition and had violated terms and conditions of the approved petition.

Counsel submitted a timely I-290B appeal. On appeal, counsel stated that he and the petitioner had not received the NOIR issued in this matter. The AAO observes that the NOIR appears to have been sent to counsel's address of record, and that the record of proceeding contains no indication that it was returned as undeliverable. Further, on appeal counsel is using that same address.

Nevertheless, the AAO will address the additional evidence submitted by counsel, on appeal, pertinent to the location or locations at which the beneficiary would work and the project or projects she would work on.

The additional evidence provided includes (1) a portion of a Master Services Agreement between the petitioner and [REDACTED]; (2) one page of a work order, (3) a letter from [REDACTED] at [REDACTED] and (4) an additional LCA.

In the Master Services Agreement provided, the petitioner and 4 Consulting agreed to terms pursuant to which the petitioner might assign its workers to projects being developed by 4 Consulting. The enumeration of the pages of that agreement indicates that it consists of 14 pages. Nine of those pages were provided. The reason the remaining five pages were omitted is unknown to the AAO. The signature page, which, if signed, would indicate that the agreement was ratified, was not provided.

The work order provided is titled "Exhibit 'A' Work Order" and is enumerated Page 16 of 16, which indicates that fifteen pages of that agreement were omitted. In the page of the Work Order, the petitioner agreed to provide the beneficiary to 4 Consulting to work on a project for Deloitte Consulting either in [REDACTED] or at any other location specified by [REDACTED]. In addition to paying an hourly fee for the beneficiary's services, 4 Consulting agreed to pay for the beneficiary's travel expenses. That Work Order was ratified by the petitioner and 4 Consulting on January 24, 2012, and states that the duration of the beneficiary's assignment was six months, but does not specify a beginning or end date of that six-month period.

The letter from [REDACTED] is dated June 14, 2012. It states, "[The beneficiary] has successfully fulfilled the requirements of her position since joining [REDACTED] Care Management System," which indicates that, on June 14, 2012, the beneficiary was already working on the project or projects described. The letter does not state a commencement date or an end date for the beneficiary's employment, but states, "This project is long-term; no end-date is anticipated at this time." The letter also indicates that the project location is as follows: [REDACTED]

The additional LCA submitted was certified on October 25, 2011, a date subsequent to the filing of the instant visa petition, for employment in and around [REDACTED] from October 19, 2011 to October 19, 2012. That LCA may not be used to support the instant visa petition for reasons explained below.

General requirements for filing immigration applications and petitions are set forth at 8 C.F.R. §103.2(a)(1) as follows:

[E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission

Further discussion of the filing requirements for applications and petitions is found at 8 C.F.R. § 103.2(b)(1), which states in pertinent part:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions.

In cases where evidence related to filing eligibility is provided in response to a director's request for evidence, 8 C.F.R. § 103.2(b)(1) states:

An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed

The regulations require that before filing a Form I-129 petition on behalf of an H-1B worker, a petitioner obtain a certified LCA from the DOL in the occupational specialty in which the H-1B worker will be employed. See 8 C.F.R. § 214.2(h)(4)(i)(B). The instructions that accompany the Form I-129 also specify that an H-1B petitioner must document the filing of a labor certification application with the DOL when submitting the Form I-129.

A petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm'r 1978). In the instant case, the visa petition was supported by an LCA properly certified for employment in and near [REDACTED] prior to the visa petition filing date. The record now makes clear that the petitioner is not employing the beneficiary in its location in [REDACTED] but in a location selected by [REDACTED]. The LCA submitted with the visa petition is only valid for employment in and near Richmond, Virginia. Further, the LCA submitted on appeal cannot be used to support the visa petition because it was certified after the visa petition was filed, contrary to the requirements of the regulations cited above. The LCA submitted on appeal will not be considered further, and the beneficiary may not, consistent with the terms and conditions of the instant visa petition and supporting documents, be employed in a location that is not in or near [REDACTED].

The evidence submitted on appeal makes clear that, contrary to the terms and conditions of the previously approved visa petition, the beneficiary has been working on a [REDACTED] through [REDACTED] location or at some other location specified by [REDACTED] rather than at the petitioner's own [REDACTED]. Further, the letter from [REDACTED] appears to indicate that the beneficiary has worked for [REDACTED] at other locations. Further still, the inclusion of a clause pertinent to travel expenses in the Work Order with [REDACTED] suggests that the beneficiary may work in other, yet unidentified, locations for [REDACTED] Consulting.

Because the beneficiary is no longer working in a location for which the LCA submitted with the visa petition is valid, the petitioner has violated the terms and conditions of the approved visa

petition. Approval of the instant visa petition was correctly revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(3). The appeal will be dismissed and approval of the visa petition will remain revoked on that basis.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.